Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petition For Declaratory Ruling Relating To	)	
Commission's Jurisdiction Over Interstate	)	
Telemarketing	)	

REPLY COMMENTS OF

THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association ("USTelecom")[1] submits these reply comments in support of the petitions seeking Commission preemption of state regulation of interstate telemarketing.

USTelecom does not oppose telemarketing regulation *per se*, nor does it advocate any Commission action that would bar or unduly impair legitimate state regulation of intrastate telecommunications. What USTelecom does oppose is irrational or unlawful telemarketing regulation. As the parties made abundantly clear in the Joint Petition,[2] the current morass of conflicting actual, pending and proposed state laws and federal law on interstate telemarketing is *both* irrational and unlawful. Furthermore, the burdensome and slow approach to conflict

[1] USTelecom is the nation's leading and oldest trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

[2] Alliance Contact Services, *et al*. Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, filed April 29, 2005 ("Joint Petition").

preemption by the Commission is unworkable. Thus, USTelecom urges the Commission, without delay, to preempt the field of interstate telecommunications, either as a matter of the will of Congress or as a matter of its own discretion.

In the alternative, the Commission should grant all the petitions seeking conflict preemption. In particular, as detailed herein, Wisconsin's ban on all prerecorded messages conflicts with the federal rule *requiring* a prerecorded message on abandoned calls.

I. THE COMMISSION MUST DECLARE THE FIELD PREEMPTED.

USTelecom agrees wholeheartedly with the legal analysis and factual support laid out in the Joint Petition as well as in the comments submitted in this docket by USTelecom members, Verizon and BellSouth. The plain fact is that interstate telemarketing, in practice, is not really governed by federal law. Rather, it is governed by an impossibly complex (and, sadly, growing) set of inconsistent and contradictory state laws and rules that do not respect federal authority over interstate telemarketing. As the courts have made abundantly clear, "state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively."[3] In the Telephone Consumer Protection Act,[4] Congress unquestionably gave the Commission complete jurisdiction over regulations specific to *interstate* telemarketing, and specifically limited state regulation of telemarketing requirements to *intrastate* telemarketing. The Commission must act to enforce this Congressional dichotomy. Given the current, worsening myriad of state regulation of interstate telemarketing, there is no choice but

[3] *Vera M. English v. General Elec. Co.*, 496 U.S. 72, 79 (1990); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[4] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

for the Commission to preempt the field to ensure balance and uniformity in interstate telemarketing regulation.

II. AT A MINIMUM, THE COMMISSION MUST GRANT THE PETITIONS FOR CONFLICT PREEMPTION.

Although USTelecom maintains that field preemption is the proper approach, it also supports each of the petitions for conflict preemption (as well as the comments thereon of USTelecom members Verizon and BellSouth) in the alternative. As the petitions make clear, the Supreme Court unquestionably has held that preemption of state law is warranted where that law "make[s] it impossible for private parties to comply with both state and federal law" or where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[5] There is an irrefutable case of conflict preemption both as a matter of law and policy with respect to each of the contested state laws set forth in the petitions. Moreover, the states' arguments of sovereign immunity are simply meritless, as demonstrated in the comments for Verizon and others. Finally, there is one important conflict stated in the *CBA/Wisconsin Petition*[6] that merits further analysis.

III. THE FEDERAL RULE ON ABANDONED CALLS PREEMPTS THE WISCONSIN BAN ON PRERECORDED MESSAGES.

The *CBA/Wisconsin Petition* lists the Wisconsin ban on prerecorded messages as one of the offending provisions. Although the *CBA/Wisconsin Petition* fully supports this claim, there

[5] *Alexis Geier, et al v. American Honda Motor Company,* Inc., 529 U.S. 861, 884 (1999).

[6] *Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code*, DA 04-3836, filed Nov. 19, 2004 ("*CBA/Wisconsin Petition*") (citing Wis. Stat. § 100.52 (2003) and Wis. Admin. Code, §§ ATCP 127.02-127.20 and 127.80-127.84).

is a separate and independent ground for preempting this particular provision. It conflicts with the federal rule regarding abandoned calls.

Federal rules require telemarketers to play a prerecorded message on abandoned calls:

> § 64.1200 Delivery restrictions.
>
> (a) No person or entity may: . . .
>
> (6) Abandon more than three percent of all telemarketing calls that are answered live by a person, measured over a 30-day period. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting. Whenever a sales representative is not available to speak with the person answering the call, that person *must receive, within two (2) seconds after the called person's completed greeting, a prerecorded identification message* that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed, and that the call was for "telemarketing purposes."[7]

On the other hand, Wisconsin regulations purport to ban all prerecorded messages on calls with a telemarketing purpose:

> **(2)** *No person may* do any of the following: . . .
>
> (b) *Use an electronically prerecorded message in a telephone call for the purpose of encouraging* a residential or nonresidential telephone customer *to purchase* property, goods or services, without the prior consent of that telephone customer.[8]

Obviously, the "purpose" of an abandoned interstate telemarketing call under 47 C.F.R. §64.1200(a)(6) is to "encourage[e] a . . . customer to purchase" something. Therefore, the Wisconsin rule would appear to prohibit use of a prerecorded message on such an interstate abandoned call. Yet the federal rule *requires* the use of a prerecorded message on that same

[7] 47 C.F.R. §64.1200(a)(6) (emphasis added).

[8] Wis. Admin. Code § ATCP 127.83(2)(b) (emphasis added). This includes interstate calls. Wis. Stat. §100.52(7) ("TERRITORIAL APPLICATION. This section applies to any interstate telephone solicitation received by a person in this state and to any intrastate telephone solicitation.").

interstate call. Given the policies of balance and uniformity underlying the TCPA, all that is required for conflict preemption in this context is that the federal law permit something that the state law prohibits.[9] More than prohibiting something *permitted* by federal law, the Wisconsin rule purports to prohibit something that is *required* by federal law.

Wisconsin is not the only state with a ban on prerecorded messages. "Arizona, Colorado, Georgia, New Mexico, North Carolina, and Texas all prohibit, without exemption, the use of pre-recorded messages for solicitation without the consumer's prior consent."[10] These other state bans on prerecorded messages might also be preempted, which brings us full circle and back to field preemption: there currently are no pending petitions for conflict preemption regarding these other states' provisions, and it would take many months, if not years, to get any such petitions decided. This is just one more of the abundant number of examples demonstrating the utter inadequacy of conflict preemption to the massive task at hand and showing the indisputable need for the Commission to enforce, or engage in, field preemption.

[9] Verizon Comments at 6-8 (Feb. 17, 2005).

[10] Joint Petition at 19.

CONCLUSION

The Commission should grant the Joint Petition and declare that the field of interstate telemarketing regulation is preempted by federal law. Absent that, at a minimum, the Commission should grant all of the pending petitions for conflict preemption

Respectfully submitted,

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